

STATE OF MICHIGAN
COURT OF APPEALS

JAN MILLER,

Plaintiff-Appellee,

v

STATE OF MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,

Defendant-Appellant.

UNPUBLISHED

November 27, 2007

No. 271971

Mackinac Circuit Court

LC No. 2004-5907-CD

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant, State of Michigan Department of Natural Resources (DNR), appeals by leave granted the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(7) in this employment discrimination action. While the instant state action was pending, plaintiff, Jan Miller, filed a second discrimination suit against defendant in federal court alleging the same theories of discrimination and the same facts as alleged in the state suit. The federal court dismissed plaintiff's complaint on defendant's motion for summary judgment. Defendant's unsuccessful motion for summary disposition in this action was premised on the doctrines of collateral estoppel and res judicata. After reviewing the record, we conclude that res judicata and collateral estoppel barred plaintiff's claims in the state court; and therefore, we reverse the trial court's denial of defendant's motion for summary disposition.

I

Plaintiff filed this gender discrimination action in state court under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, alleging that defendant created a hostile work environment so extreme that she was unable to continue her employment and thus she was constructively discharged. Although not specifically set out, plaintiff also alleged claims of retaliatory conduct against defendant in her complaint. Plaintiff later filed a gender-based employment discrimination lawsuit in federal court against defendant alleging violation of Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000e *et seq.*, predicated on the same factual allegations as those in her state court action. In the state action, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) alleging generally that plaintiff could not show that her gender played any role challenged work-related decisions, that most of the conduct she alleges in support of her allegations is outside the limitations period, and, in any event, can not support a legally recognized adverse employment action. Defendant further alleged that plaintiff could not show that defendant treated her differently from any similarly situated male

conservation officer. The trial court denied the motion stating that after reviewing the record in the light most favorable to plaintiff, a “slim circumstantial predicate requiring jury submission” existed.

Subsequently, the federal court granted defendant’s motion for summary judgment under FR Civ P 56 and dismissed plaintiff’s claims with prejudice. In a lengthy written opinion accompanying the judgment, the federal court determined: several of plaintiff’s claims were barred by the applicable statute of limitations; plaintiff had failed to present a prima facie case hostile work environment because none of the behaviors alleged rose to the level of severity and pervasiveness required to establish a hostile environment harassment claim; plaintiff’s disparate treatment and failure to promote claims failed because plaintiff did not establish a prima facie case of discrimination either by presenting direct evidence of intentional discrimination by defendant or by showing the existence of circumstantial evidence which creates an inference of discrimination, i.e., that a similarly-situated individual was treated differently; even had plaintiff satisfied her prima facie burden, defendant had demonstrated a legitimate nondiscriminatory reason for the transfer at issue, and plaintiff had failed to demonstrate that defendant’s reason was pretextual; plaintiff failed to demonstrate a prima facie case of retaliation because she failed to establish any causal nexus between the allegations of discrimination and the adverse employment actions; even had she satisfied her prima facie burden, plaintiff failed to rebut defendant’s legitimate nondiscriminatory reasons for its actions; and, finally, plaintiff failed to demonstrate that she was constructively discharged because she had failed to demonstrate a Title VII violation. The record displays that plaintiff did not appeal the federal court decision.

Thereafter, defendant filed a second motion for summary disposition in the state court. This time defendant filed its motion pursuant to MCR 2.116(C)(7) on the grounds that the doctrines of collateral estoppel and res judicata barred plaintiff’s claims in light of the federal court’s entry of judgment in defendant’s favor in the federal action that raised identical claims as plaintiff asserted in the instant matter and constituted a final adjudication of the merits of the claims. Plaintiff responded that an application of either res judicata or collateral estoppel in this matter would improperly elevate the federal judge to the position of a state appellate judge and allow the federal judge to overrule the trial court’s determination that genuine issues of material fact exist.

After entertaining oral arguments on the motion, the trial court denied defendant’s motion from the bench stating that the federal court’s “inference breadth,” particularly regarding causation, was narrower than its own and ultimately held that “there cannot be a bar by reason of a summary judgment in Federal Court.” The trial court’s order denying defendant’s motion also stayed trial court proceedings to allow defendant to pursue an interlocutory appeal which this Court granted.

II

This Court reviews “a trial court’s decision to grant summary disposition pursuant to MCR 2.116(C)(7) by considering the affidavits, pleadings, and other documentary evidence and construing them in the light most favorable to the nonmoving party.” *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). This Court reviews de novo the question whether res judicata bars a subsequent action. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). Likewise, this Court reviews de novo both a trial judge’s decision to deny a motion for

summary disposition and the question whether collateral estoppel bars a subsequent action. *Barrow, supra*. Summary disposition constitutes a determination on the merits for purposes of collateral estoppel. *City of Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990).

III

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002); *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006); *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Generally, an application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 667 NW2d 843 (2004). Even when otherwise applicable, collateral estoppel will be qualified or rejected if its use would contravene an overriding public policy or result in manifest injustice. *Storey v Meijer, Inc*, 431 Mich 368, 377 n 9; 429 NW2d 169 (1988); *Horn v Dep't of Corrections*, 216 Mich App 58, 64; 548 NW2d 660 (1996).

Defendant supports its claim of entitlement to summary disposition with several unpublished opinions issued by this Court. We recognize that unpublished opinions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1). Nevertheless, one of the opinions is sufficiently similar to the circumstances presented in this matter, and we find its reasoning persuasive. In *Swanson v Livingston County*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2005 (Docket No. 251483), slip op at 1, lv den 474 Mich 936 (2005), the plaintiff originally filed a sexual discrimination and retaliation lawsuit in the federal court under Title VII, 42 USC § 2000 *et seq.*, alleging a hostile work environment, retaliation, and retaliatory harassment. The federal court granted summary judgment in favor of the defendants on the ground that there were no genuine issues of material fact and dismissed the lawsuit. In the meantime, the plaintiff commenced a discrimination lawsuit in the circuit court under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, alleging a sexual discrimination claim identical to the sexual discrimination claim alleged in her federal lawsuit. The plaintiff subsequently amended her complaint in state court to allege retaliation and retaliatory harassment claims. *Id.*, slip op at 1. The defendants moved for summary disposition in the circuit court on the grounds that the plaintiff's state claims were precluded by the doctrines of collateral estoppel and res judicata. *Id.*, slip op at 1-2. The trial judge denied the motion. The defendants sought an interlocutory appeal, which this Court granted. *Id.*, slip op at 2.

The panel of this Court in *Swanson, supra*, engaged in a detailed comparison of the plaintiff's claims in both the state and federal actions. In doing so, it compared the factual predicate for the plaintiff's claims and the elements that the plaintiff had to establish to demonstrate a prima facie case of hostile environmental sexual harassment and retaliation. The

Swanson Court ultimately concluded that the plaintiff's state court action was precluded by application of the doctrine of collateral estoppel because the state court was required to reach and decide the very same essential questions already litigated and determined in a final judgment issued by the federal court. *Swanson*, slip op at 2-4.

Further, the *Swanson* Court also concluded that the plaintiff's state court action was precluded by application of the doctrine of res judicata. The panel explained:

Plaintiff's claims are also precluded by the related doctrine of res judicata, which is used "to prevent multiple suits litigating the same action." *Adair, supra* at 121. Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privities, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.*

The first prong is satisfied because the previous lawsuit was resolved by the granting of defendants' motion for summary judgment. Summary judgment constitutes a judgment on the merits for purposes of res judicata. *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Further, both the federal and pending state actions involve the same parties or their privities. Kristy L. Swanson is the plaintiff in both actions and Livingston County and the Livingston County Sheriff are the defendants in both actions. Plaintiff's federal complaint alleges a hostile work environment, retaliation and retaliatory harassment, and plaintiff alleges the same theories in her state complaint. As discussed in detail above, these causes of action were litigated and resolved in the federal lawsuit, and "the factual basis for plaintiff's Title VII claim is the same as the factual basis for [her] Elliott-Larsen Civil Rights claim." *Chakan v The City of Detroit*, 998 F Supp 779 (ED Mich, 1998) (After the plaintiff's Michigan Civil Rights Act action was dismissed in state court, the plaintiff's Title VII claim in federal court was dismissed under doctrines of collateral estoppel and res judicata because same issues were actually litigated in both cases to a final decision on the merits). Thus, plaintiff's state court claim is barred by res judicata.

Plaintiff argues that collateral estoppel does not apply to her state law claim in part because the legal standards for establishing claims of a hostile work environment, retaliation, and retaliatory harassment under Title VII and the Michigan Civil Rights Act are different. However, the standards for these claims under Title VII and the Civil Rights Act are at least equivalent or substantially similar, if not identical. More importantly, it is the issues, not the legal standards, that must be the same for collateral estoppel to apply. Those issues are the same in the present case. [*Swanson*, slip op at 4-5.]

After careful review of the record in this instant matter, we conclude that the case at bar is nearly identical in form and substance to the *Swanson* case. Here, the federal judgment entered on defendant's motion for summary judgment constitutes a judgment on the merits for purposes of both collateral estoppel, *VanVorous v Burmeister*, 262 Mich App 467, 469, 479-481, 484; 687 NW2d 132 (2004), and res judicata, *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Further, both the state and federal actions involved

the same parties: Jan Miller as plaintiff and the DNR as defendant. Plaintiff's federal complaint contains allegations identical to those found in her state complaint. Indeed, plaintiff repeats all 15 paragraphs of her state complaint in her federal complaint. Her federal complaint differs from her state complaint only in the fact that she references federal law in her federal complaint and adds three additional paragraphs that reference this federal law and her filing of complaints with the EEOC and the EEOC issuance of right to sue letters. Our review of plaintiff's answers to defendant's motion for summary disposition in state court and for summary judgment in federal court reveal substantially similar arguments and claims advanced in both actions. Her theories of recovery advanced in both actions are hostile work environment gender discrimination and retaliation. The factual predicate in both cases is identical. Plaintiff's causes of actions were litigated and resolved in the federal action. Under the circumstances, and for all of these reasons, we conclude that defendant is entitled to summary disposition in this matter predicated on the basis of collateral estoppel and res judicata.

IV

Because of our resolution of the foregoing issues renders it moot, we need not address plaintiff's defense relying on *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372; 596 NW2d 153 (1999).¹ See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). In *Pierson Sand*, our Supreme Court ruled that, "where the [federal] district court dismissed all plaintiff's federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state law claims." *Id.*, 387. The Court then ruled that under such circumstances, the doctrine of res judicata would not bar a state court action based on state law claims. *Id.*, 375, 382-387. Plainly, *Pierson Sand*, involves only the doctrine of res judicata, so even were we to adopt plaintiff's reasoning, defendant would still be collaterally estopped from asserting its defense. And, in any event, plaintiff has provided no factual support for her

¹ During the pendency of this litigation the law concerning res judicata seemed to be in somewhat of a state of flux after our Supreme Court, in *Tate v City of Dearborn*, 474 Mich 1000; 708 NW2d 109 (2006), directed the parties to brief the following questions, amongst others:

- (1) whether application of the rule of *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372 (1999), to this case tends to encourage gamesmanship by giving plaintiffs an incentive to fail to plead a theory in federal court, with hope of later litigating that theory in state court, because it was arguably possible, or even probable, that the federal court would have declined to exercise its jurisdiction;
- (2) whether there are distinguishing factors between this case and *Pierson*, *supra*;
- (3) whether, if a plaintiff wants to preserve state law claims based on the same facts as an action it has brought in federal court, it should be obligated to plead them, or at least attempt to plead them, in federal court[.] [*Id.*, 1000-1001.]

But, our Supreme Court recently vacated its earlier order in April 2007 stating that it was "no longer persuaded the question presented should be reviewed by this Court." *Tate v City of Dearborn*, 477 Mich 1101; 729 NW2d 521 (2007).

assertion that the federal court would not have exercised supplemental jurisdiction over her state discrimination claims arising from identical facts. We would therefore have no way to ascertain whether the federal court would have exercised its supplemental jurisdiction.

V

Finally, plaintiff argues she has newly discovered evidence that could differentiate her state lawsuit different from her federal claim and thus defeat the application of res judicata and collateral estoppel. This argument does not require a different result in this matter. Our order granting leave to appeal was limited to the issues raised in the application. Plaintiff failed to raise this issue previously, and accordingly, we decline to consider this issue. See MCR 7.205(D)(4); *O'Connor v Comm'r of Ins*, 236 Mich App 665, 673; 601 NW2d 168 (1999), rev'd on other grounds 463 Mich 864 (2000). In any case, the record reveals that plaintiff filed a motion to remand this case to the trial court in order to expand the record, however, this Court denied her motion, and we decline to revisit that decision.

VI

In conclusion, we hold that defendant is entitled to summary disposition in this matter because both collateral estoppel and res judicata bar plaintiff's claims.

Reversed.

/s/ Pat M. Donofrio

/s/ Joel P. Hoekstra

/s/ Jane E. Markey